

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: NATIONAL COLLEGIATE) Docket No. 13 C 9116
ATHLETIC ASSOCIATION STUDENT-)
ATHLETE CONCUSSION INJURY) Chicago, Illinois
LITIGATION,) July 29, 2014
) 2:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS - STATUS, MOTION
BEFORE THE HONORABLE JOHN Z. LEE

APPEARANCES:

ALSO PRESENT: HONORABLE GERALDINE SOAT BROWN

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1 (Proceedings had in open court:)

2 THE CLERK: 13 C 9116, NCAA Student-Athlete Concussion
3 Injury Litigation, for status and motion hearing.

4 MR. BERMAN: Good afternoon, your Honor. Steve Berman
5 on behalf of plaintiffs.

6 MR. SIPRUT: Good afternoon, your Honor. Joe Siprut
7 on behalf of plaintiffs.

8 MR. EDELSON: Good afternoon, your Honor. Jay Edelson
9 and Ari Scharg on behalf of plaintiff Nichols and the proposed
10 personal injury class.

11 MR. ZIMMERMAN: Charles Zimmerman, your Honor, on
12 behalf of the plaintiffs.

13 MR. LEWIS: Richard Lewis on behalf of the plaintiffs,
14 your Honor.

15 MR. MESTER: Good afternoon, your Honor. Mark Mester
16 and Johanna Spellman on behalf of the NCAA.

17 THE COURT: Do we have people on the phone?

18 MR. TROXEL: Good afternoon, your Honor. Jeremy
19 Troxel on behalf of plaintiffs.

20 THE COURT: Can you talk more slowly and more clearly
21 into the receiver, please.

22 MR. TROXEL: Jeremy Troxel on behalf of the
23 plaintiffs.

24 MR. SELMER: James Selmer on behalf of the plaintiffs.

25 MR. GUDMUNDSON: Brian Gudmundson on behalf of the

1 plaintiffs.

2 MR. DUGAN: Good afternoon, your Honor. James Dugan,
3 with the Dugan Law Firm in New Orleans, on behalf of the
4 plaintiffs.

5 MR. NEWTON: Clark --

6 MS. PAVA: Good afternoon --

7 MR. NEWTON: Clarke Newton on behalf of the
8 plaintiffs.

9 MS. PAVA: Mindy Pava on behalf of the plaintiffs.

10 THE COURT: How do you spell that last name, please?

11 MS. PAVA: Pava, P-a-v-a.

12 THE COURT: Anyone else on the phone?

13 MR. ELLIS: Yes, Ryan Ellis at the Lanier Law Firm on
14 behalf of plaintiffs.

15 MR. MILLER: And Rodney Miller on behalf of the
16 plaintiffs.

17 MR. FRANCO: David Franco on behalf of the plaintiffs.

18 MS. TOOPS: Lynn Toops on behalf of the plaintiffs.

19 THE COURT: Anyone else? All right. Good afternoon,
20 everyone.

21 We are here on status in this case as well as the
22 motion that was filed this morning, of which I got a copy of
23 late yesterday, with regard to seeking the Court's preliminary
24 approval of the settlement.

25 Before we proceed to the motion for preliminary

1 approval of the settlement, I did want to address a couple of
2 procedural matters. First of all, with regard to the
3 appointment of lead counsel in this case, the last time we were
4 all together, I told you I'd take a look at all the motions,
5 and if I thought it was appropriate go ahead and issue an order
6 while the parties were pursuing the settlement discussions.

7 The papers that the parties filed raised some
8 questions in my mind with regard to the motion filed by the
9 Hagens Berman firm on behalf of what Hagens Berman termed the
10 medical monitoring plaintiffs. And I just wanted to get some
11 more clarification with regard to Hagens Berman's position and
12 what exactly it's seeking in its motion for appointment of lead
13 counsel.

14 And so, Mr. Berman, I am glad you are here.

15 With regard to the request by Hagens Berman to be
16 appointed as lead counsel, the medical monitoring class,
17 so-called medical monitoring class, is defined by Hagens Berman
18 to include the various plaintiffs of the various cases,
19 including obviously the Arrington case which is the first-filed
20 case that was filed in this court originally. But I just want
21 to be clear.

22 To the extent that the medical monitoring class as
23 defined by the Hagens Berman firm includes or is defined to
24 include the class or the proposed class that is defined in the
25 Arrington case, that class as defined in the second amended

1 complaint includes not only a class seeking relief under
2 23(b)(2), that is medical monitoring, but also a putative class
3 that seeks damages as a result of the alleged negligence on the
4 part of NCAA under 23(b)(3).

5 And I wanted to be clear because this was an issue
6 that has been discussed in prior statuses between the Hagens
7 Berman firm and Mr. Edelson on behalf of the Nichols
8 plaintiffs, that, Mr. Berman, medical monitoring plaintiffs as
9 defined would include at this point both putative classes, is
10 that correct? That is, the plaintiffs who are asking for
11 injunctive relief as well as plaintiffs at this point in time,
12 as stated in the second amended complaint, that are also
13 seeking damages as a result of the alleged actions or inactions
14 by the NCAA.

15 MR. BERMAN: Let me see if I can answer to your
16 satisfaction, your Honor.

17 There -- there are individual plaintiffs who are class
18 representatives, who are seeking damages not as class relief
19 but separate -- their lawsuits will continue to seek damages.
20 We are not seeking in the medical monitoring class or in the
21 injunctive relief class any actual damages for personal
22 injuries.

23 THE COURT: No, I understand that. But I'm just
24 trying to assess whether you believe that if I were to grant
25 your motion, that it would be part of your responsibilities to

1 protect and oversee the best interests of the putative class
2 members who are also seeking damages, as alleged in your
3 complaint.

4 MR. BERMAN: Well, that's an interesting question.

5 THE COURT: That's why I am asking it.

6 MR. BERMAN: Because there is a difference of opinion.
7 So right now I am representing and seek to represent in the
8 settlement all NCAA athletes who have ever played. The claims
9 we're seeking to have you approve are medical monitoring and
10 injunctive relief, not damages.

11 So we think we're acting in their best interest by
12 proposing that settlement and providing in the settlement that
13 they are free to pursue personal injury claims on their own,
14 not on a class basis. And the reason that we came around that
15 way is very simple. We think case law is quite clear, you
16 cannot certify personal injury claims.

17 I'll give you an example. I have --

18 THE COURT: Well, I mean, I guess, you know -- I am
19 sure we will get into that later on in this hearing. But my
20 question is really much more of a threshold question, right?
21 I'm trying to ensure that lead counsel in this case are going
22 to act in the best interest of all putative class members with
23 regard to all their claims, right? Maybe it's in their best
24 interest, as you say, to waive the right to proceed, to waive
25 their basically 23(b)(3) rights, to preserve their personal

1 injury rights individually. And maybe that's in the interest
2 of the entire class, you believe, to do that.

3 Some people might disagree. But I just want to make
4 sure that when you are proceeding, if you are going to be
5 proceeding as lead counsel, that you are pursuing the best
6 interests of all putative class members with regard to all
7 their claims, and making your decisions in the best interests
8 of that whole -- of the entire putative class.

9 MR. BERMAN: And I think I have. I think when you
10 look at the settlement -- the settlement, by the way, is -- you
11 see you got a lot of papers, and you haven't had a chance to go
12 through them, I am sure. But we have hired the leading
13 scientist in the country. We have hired the leading
14 statistician in the country. We have gone through this with
15 two retired federal judges who are overseeing this and watched
16 everything I've done and my co-lead counsel have done.

17 And I think they have concluded that we have acted in
18 the best interest of the class. And I submit to the Court we
19 have.

20 THE COURT: By the class, you --

21 MR. BERMAN: I mean everyone, everyone who's got a
22 claim, even if they have a personal injury claim.

23 THE COURT: All right. Mr. Edelson, I'll provide you
24 with, if you want, a brief response or reaction.

25 MR. EDELSON: I was actually really interested to hear

1 what the position was today. I am still not sure I understand.

2 But from our point of view the class as currently
3 defined is actually -- we -- we were very concerned about what
4 the deal would look like, and it's far worse than what we
5 thought. The class as defined is anyone who's ever been an
6 NCAA athlete. You got bowlers and archers in there, who I
7 don't know why they have any similar interest.

8 Also you've got the people who are really injured, the
9 people who this -- when they brought the class action, they
10 told the press in their court papers, the Court, what they
11 really cared about, which was getting and address the people
12 who had suffered injury as a result of concussion. Those
13 people are getting absolutely no benefit at all. The only
14 thing they get is this basically post-lawsuit class action
15 waiver.

16 THE COURT: No, I mean, I understand that is your
17 position. And it has been consistent throughout. And I
18 appreciate the consistency.

19 I guess my question, what I am trying to decide on the
20 applications for lead counsel, which is what I am doing now,
21 is, I want to make sure that whoever is leading the charge is
22 keeping everyone's interest in mind.

23 Now, the decisions that they make on behalf of
24 everyone may or may not be disagreed with or agreed with with
25 the rest of the world. But I want to make sure that that

1 person or that law firm is considering and considers themselves
2 to be responsible for the entire class. And what I
3 understand -- because it wasn't quite clear in the papers.

4 So what I understand from Mr. Berman today is that is
5 Hagens Berman's position. Is that right?

6 MR. BERMAN: It is, your Honor.

7 And can I just say one more thing in that regard? I'm
8 probably one of the few lawyers in the room that is actually
9 litigating individual concussion cases, filed cases, not just
10 talking about it but litigating. And I can tell you that in
11 each case I have to -- first of all, I have to see who was
12 responsible. Lot of times it's the school, not the NCAA. I
13 have to hire vocational experts. I have to hire concussion
14 experts. I have to hire neuropsychologists. I have to have
15 IMEs done for my clients.

16 So when I look at what's in the best interest of those
17 clients, based on that experience, in my view it's -- the best
18 thing for them to do is to have a chance at medical monitoring.
19 And if you actually have concussion injury, then you can find a
20 lawyer who's going to do your case on an individual basis and
21 do what needs to be done for that client, rather than try to
22 shoehorn them into some class action which we think would not
23 be certified.

24 THE COURT: Okay.

25 MR. SIPRUT: Judge, if I may also put on the record,

1 the motion seeks the appointment of the Hagens Berman firm and
2 my firm, Siprut P.C., as co-lead counsel, consistent with the
3 original appointment of lead counsel three years ago when this
4 case was first filed and litigated. Our two firms have done
5 all the work to get to this point. And the motion seeks the
6 appointment of those two firms as lead counsel along with the
7 structure that we put together happily by agreement. So
8 sometimes miracles can happen. We worked out something here.

9 What I want to emphasize to the Court, if I might, is
10 that I take the obligations that your Honor has alluded to and
11 identified incredibly seriously. And I'm extremely cognizant
12 of them and have been throughout this process. And I think my
13 colleague Mr. Berman speaks eloquently about how we have
14 managed those obligations and have achieved what we think is a
15 great result, consistent with those obligations.

16 So I just want to echo and reiterate that. And
17 hopefully the Court will see fit to accept our application so
18 we can continue on this path.

19 MR. MESTER: Your Honor, if I may?

20 THE COURT: Hold on for a second.

21 So, Mr. Siprut, I am glad you brought it up because I
22 just wanted to make sure that I get this on the record as well.

23 So you too agree that your obligations to represent
24 your clients in this case, should you be appointed as lead
25 counsel, would include the entire class as defined by the

1 second amended complaint in Arrington as well as all of the
2 other complaints that were filed as part of this MDL, is that
3 correct?

4 MR. SIPRUT: That's correct. And furthermore, the
5 settlement that we have proposed to your Honor that we're here
6 for today is, we believe, consistent with the discharge of
7 those duties and obligations.

8 THE COURT: Yes.

9 MR. MESTER: Your Honor, there is one provision of the
10 settlement agreement I want to call your attention to that I
11 think may give you some comfort with regard to this issue.
12 Mindful of the issues that Mr. Edelson raised, the settlement
13 agreement, the proposed settlement agreement, specifies that
14 the statute of limitations with respect to those bodily injury
15 claims has been tolled since they were first brought and will
16 be continued to be tolled through the preliminary approval.

17 So there will be no question with respect to any
18 prejudice for these individuals that -- that you're addressing
19 and the types of claims you're addressing. So that -- that's a
20 portion -- that's an element of the settlement.

21 THE COURT: Okay. Very well. I will issue a written
22 order to this effect. But with regard to the -- with those
23 clarifications and affirmations, with regard to the motion for
24 appointment as lead counsel in this case, on April 14 I ordered
25 the parties to submit applications to serve as lead and liaison

1 counsel in connection with this MDL action. The NCAA, the
2 defendant, submitted an unopposed application for designation
3 of lead and liaison counsel requesting Latham & Watkins be
4 appointed as its lead and liaison counsel.

5 Jay Edelson, counsel for plaintiff Anthony Nichols and
6 those similarly situated, filed a motion to appoint Jay Edelson
7 as lead counsel of the class personal injury claims.

8 Steve Berman of Hagens Berman submitted a joint agreed
9 application for appointment of lead counsel special class
10 counsel for monitoring relief and executive committee for the
11 medical monitoring plaintiffs on behalf of his firm as well as
12 other firms, including Mr. Siprut's firm. The applications
13 were submitted pursuant to Rule 23(g)(3), which provides the
14 Court may in its discretion designate interim counsel to act on
15 behalf of the putative class before determining whether to
16 certify the action as class action.

17 All class counsel appointed pursuant to Rule 23(g)
18 have the duty to fairly and adequately represent the interests
19 of the class under Rule 23(g)(4). Where, as here, more than
20 one adequate applicant seeks appointment as counsel, the Court
21 must appoint the applicant best able to represent the interests
22 of the class under Rule 23(g)(2).

23 First, with regard to the NCAA, it requests that the
24 Court appoint Latham & Watkins. Not only is there no objection
25 to this request, but Latham & Watkins has been representing the

1 NCAA from the inception of the Arrington case in 2011 and is
2 intimately familiar with the issues involved in this case.

3 Additionally Latham & Watkins has substantial
4 experience serving as lead and liaison counsel in numerous
5 other class actions of this magnitude. Accordingly the Court
6 grants the NCAA's application and designates Mark Mester of
7 Latham & Watkins as lead counsel for the NCAA, and Johanna
8 Spellman also of Latham & Watkins as its liaison counsel.

9 Second, the Court notes as a preliminary matter as
10 discussed here today that the term medical monitoring
11 plaintiffs, quote unquote, coined by Hagens Berman in its
12 application is a bit of a misnomer. Hagens' application
13 defines medical monitoring plaintiffs in fact to include all of
14 the plaintiffs in the Arrington case, Caldwell, Doughty,
15 Durocher, Hudson, Morgan, Power, Walton, Johnson and Wolf case.

16 The second amended complaint in Arrington in turn
17 seeks to certify class pursuant to Rule 23(b)(2) and 23(b)(3)
18 comprised of, and I quote, all current and former NCAA student
19 athletes who experienced one or more head impacts while playing
20 sports in an NCAA school resulting in concussion or concussion-
21 like symptoms, end quote. And that's in the second amended
22 complaint in Arrington, Docket No. 227.

23 In so doing the Arrington plaintiffs seek not only
24 injunctive relief under Rule 23(b)(2) in the form of medical
25 monitoring, but also monetary damages under Rule 23(b)(3) to

1 compensate plaintiffs for injuries they have suffered or will
2 suffer in the future.

3 Similarly, I note that the plaintiffs in the Durocher,
4 Powell and Wolf case also seek certification in the complaint
5 of Rule 23(b)(2) classes and 23(b)(3) classes. As a result the
6 term, medical monitoring plaintiffs, encompasses putative class
7 members who seek both, monetary damages related to alleged
8 injuries as well as injunctive relief.

9 Realizing the scope of the term, Mr. Edelson does not
10 oppose Hagens Berman's appointment as lead counsel, so long as
11 it is, in his words, limited to medical monitoring claims only,
12 but objects to the extent that Hagens Berman seeks to serve as
13 lead counsel for, quote, class personal injury issues which,
14 according to Mr. Edelson, Hagens Berman has, quote unquote,
15 consistently repudiated.

16 But in light of the statements here today as well as
17 Hagens Berman's actions in the Arrington case and prior
18 proceedings in this court, the Court disagrees with Mr. Edelson
19 and disagrees that Hagens Berman has, quote unquote, repudiated
20 the personal injury claims at this stage. They certainly have
21 not disclaimed or affirmatively waived the personal injury
22 claims during this proceeding. And for the purposes of the
23 current posture of the case, that is for the Court's
24 appointment of lead class counsel prior to the Court's decision
25 on approval of any settlement or certification of any class if

1 appropriate, I believe that in light of the fact that the
2 Arrington, Durocher, Powell and Wolf actions all seek classwide
3 relief under both 23(b)(2) and 23(b)(3), and the statements by
4 counsel, I will grant the application by Hagens Berman and
5 appoint Hagens Berman and Mr. Siprut as lead counsel for the
6 class in this case.

7 I want to be clear, that is not to say that I have
8 approved in any way the settlement the parties have proposed
9 today. But rather until such time the Court does resolve class
10 certification issues in this case, which the Court has not done
11 so to this point, counsel in these actions continue to owe a
12 duty to the entire putative class. And indeed I would note the
13 scope of the putative class in Arrington is substantially
14 identical to the putative class in the Nichols case, who Mr.
15 Edelson represents.

16 Like Arrington, the Nichols suit seeks to certify
17 Rule 23(b)(2) and (b)(3) classes for medical monitoring and
18 damages and similarly defined putative class as, quote, all
19 current and former NCAA student athletes who sustained a
20 concussion or suffered concussion-like symptoms while playing
21 NCAA-related sports, who incurred medical expenses as a result.

22 Given this overlap, the Court sees no reason at this
23 time to conclude, as Mr. Edelson argues, that counsel for the
24 Arrington plaintiffs will not be able to represent the
25 interests of an entire class as required by Rule 23(g)(2). To

1 the extent, of course, that the Nichols plaintiffs have any
2 objections to the settlement that is being proposed, the
3 Nichols plaintiffs may file an objection or be heard by this
4 Court.

5 Therefore, the Court will designate the firms of
6 Hagens Berman Sobol Shapiro LLP and Siprut PC as co-lead
7 counsel for the proposed class. In so doing the Court notes
8 that Hagens Berman and Siprut have served as co-lead counsel
9 for the Arrington plaintiffs since, as I said inception of this
10 case in 2011, have expended numerous hours in service of the
11 clients, and have moved the case along in a commendable pace.

12 Furthermore, these firms have substantial class action
13 experience and in serving as lead counsel in other class
14 actions, and have served as counsel in other comparable cases.

15 Finally the Court notes that there are economies to be
16 gained due to the fact that firms have offices in Chicago,
17 eliminating the necessity of appointing additional local or
18 liaison counsel.

19 The Arrington plaintiffs' joint application is,
20 therefore, granted as to Hagens Berman and Siprut.

21 Accordingly, the Court also designates Richard S.
22 Lewis of Hausfeld LLP as special class counsel of monitoring
23 relief. I do so because the Hausfeld firm and Mr. Lewis also
24 have substantial experience in serving as lead counsel in class
25 actions, and he has worked diligently on behalf of his clients

1 in proceeding before the MDL panel in this court.

2 Finally the plaintiffs asked the Court to appoint
3 Charles S. Zimmerman of Zimmerman Reed, Mark Zamora of the
4 Orlando Firm PC and James Dugan II of Dugan's Law Firm as
5 members of the executive committee. And the Court notes that
6 Zimmerman, Zamora and Dugan like Lewis have substantial
7 experience as class counsel and have diligently represented
8 clients in the course of this action. Thus, that application
9 is approved as well.

10 Finally, in so doing, the Court denies the motion by
11 Mr. Edelson, counsel in the Nichols case, to be appointed lead
12 counsel for putative personal injury class at this stage. As
13 set forth above, the Court has already determined that the
14 Hagens Berman, Siprut firms are best situated at this point to
15 represent the interests of the class, class as a whole.
16 Therefore, that motion is denied. But it's denied without
17 prejudice because, as all the parties know, the interaction and
18 the intersection between the 23(b)(2) class and 23(b)(3) class
19 is an issue that is going to be in some ways the heart of the
20 settlement to ensure that the rights of the absent class
21 members are protected.

22 So that's my ruling with regard to the application.

23 MR. SIPRUT: Thank you very much, your Honor.

24 MR. MESTER: Thank you, your Honor.

25 THE COURT: So having done that, let's move to the

1 motion for preliminary approval of settlement. Mr. Berman, Mr.
2 Mester, is there a particular agenda that the parties propose
3 for this?

4 MR. BERMAN: Yes, your Honor. If -- if it's okay with
5 the Court, I thought I would just -- since you got a lot of
6 paper, I might go through the settlement for just a few
7 moments, explaining the highlights. And then our agenda is to
8 ask you to preliminarily approve the settlement. We know
9 you're not going to do that today. And that you might either
10 do it without or with a hearing later, that we are at your
11 convenience.

12 There is a second step to this that we haven't
13 finished. And what we're proposing to do, we think it will
14 take us about 45 days to come up with a notice plan. So we've
15 agreed on the terms. And now we're trying to figure out the
16 notice. And it's a little trickier than normal because what we
17 have to do is to engage a claims administration firm that's
18 actually going to go hire the doctors and come up with
19 protocols to administer the tests if you approve the
20 settlement.

21 We've been working on that, but we're not just there
22 yet because it's not -- hasn't been done that often.

23 THE COURT: How are you going to go about -- I am sure
24 that the parties have given this some thought. How are you
25 going to go about trying to identify all the members in the

1 class and what notice would be reasonable?

2 MR. BERMAN: That's the other thing we're working on.
3 And we've been working on that. And let me give you -- there
4 is a lot of parts to this answer.

5 First we've been talking with Jim Messina, President
6 Obama's former campaign manager. And he is very in tune with
7 social networking and using social media. So we are developing
8 a social media plan because a lot of these student athletes are
9 on Facebook and Twitter and all the other things that people my
10 age don't necessarily use.

11 We're going to combine that with mailed notice. And
12 what we're doing now, and it's going to take a little time --
13 and Mr. Mester and my group has been working on it for a
14 while -- is, we're actually going to ask the NCAA to send a
15 letter out to its member institutions, asking them for the
16 names and addresses, to the extent they have them, of their
17 student athletes. We think they have them because they keep in
18 touch with them for alumni reasons and fundraising reasons.

19 We're also -- it turns out there is another case in
20 California that just settled called Keller versus NCAA. I'm
21 lead counsel in that case. It involves student athletes'
22 publicity rights. And they're about to get paid for misuse of
23 their rights. And we're -- we're collecting the names for that
24 settlement. So we actually have a combined effort to -- to
25 reach out to these schools because these schools now have to

1 respond in two cases.

2 The letter we're going to send from the NCAA says, if
3 you don't give us the names and addresses, we are going to
4 subpoena you. We're hoping not to have to do that. There is a
5 thousand schools. But if we have to go down that road, we have
6 to go down that road.

7 So in the next 45 days we're going to be working. And
8 then we're going to come back to you with a proposed notice and
9 distribution plan.

10 Did I missay anything?

11 MR. MESTER: No, that's right.

12 THE COURT: Okay. I would note, by the way, Mr.
13 Berman, as you mentioned, I did just receive this rather
14 impressive stack of papers. And I will say that I did have a
15 chance to read the memorandum. I have reviewed the memorandum
16 in support. But I have not had a chance to review the various
17 attachments and the documents that were provided by the parties
18 as part of this motion.

19 So I just want to let you know that that's where my
20 review of the motion stands.

21 MR. BERMAN: Okay.

22 THE COURT: I also wanted to make sure that I put on
23 the record that I am joined here today by Judge Brown, who has
24 been helping the parties in the discovery that is proceeding in
25 this case and the discovery that took place in the Arrington

1 case.

2 So you may proceed.

3 MR. BERMAN: So I'll be very brief, your Honor, just
4 to go through the highlights so you have them in mind from our
5 perspective. And also, frankly, there is a lot of press people
6 here. And I want to make sure that if the word goes out, which
7 it is, that it goes out correctly.

8 The settlement really has two aspects. And if you --
9 I have it on the monitor. But I have a hard copy if I can
10 approach.

11 THE COURT: You may.

12 While Mr. Berman goes through the presentation, there
13 is no need for counsel to remain standing here at the podium,
14 if you want to sit down. And then I will see if there is any
15 additional comments people want to add. At that point I will
16 invite you up to the podium.

17 So please take a seat.

18 MR. BERMAN: So the injunctive part under Rule
19 23(b)(3), one of our concerns, and frankly a very serious
20 concern, was that the NCAA was not living up to best practices
21 with respect to concussion management. So the injunctive
22 relief that we sought was to change those practices and require
23 every school to conform to what our experts, Dr. Cantu, says is
24 best practices.

25 So very briefly, you can see that we identify here

1 what the problem was and how the settlement changes that
2 problem. And it starts with the very basic that baseline
3 testing, it's imperative that every student athlete before they
4 begin their career has a test to see what their skill level is
5 at a cognitive level, so that if they then are injured, you can
6 measure that and see if they are off their cognitive test. So
7 we start with that.

8 We also start with probably the second most important
9 idea, your Honor, and that is, you can't return to play in the
10 same day that you've had a concussion. And you have to be
11 cleared by a physician. And what we saw through discovery and
12 what I see in my individual cases for the case I am
13 representing is that they were returned to practice, and they
14 weren't cleared by a physician. And that's really where the
15 danger is. If you're out there before you're healed, too soon,
16 that's how these kids are getting lifetime injuries. So we've
17 taken care of that.

18 We've also made sure that there are adequate medical
19 personnel at contact sports. And let me pause for a second
20 before I go to the second page.

21 There has been a lot of emphasis in America on
22 football. This is not a football-only problem. So the
23 settlement covers all contact sports. In fact, it covers all
24 sports, in the event someone was swimming in a pool and they
25 hit their head and want to get tested.

1 So we want to make sure everyone gets tested. But
2 it's important to note that it's an all-sport event because,
3 for example, I learned through this case that the second
4 leading concussion issue is female soccer, because the female
5 neck is a little different, and concussion is basically a
6 twisting of the head that jiggles the spine and the brain. So
7 when a female soccer player goes up, they tend to twist more.
8 So it's protective of the people who need protection.

9 We're also making sure that there is a reporting
10 process in place. So the schools have to report concussions in
11 a specified manner. So we have a data set so that the medical
12 science committee can be studying this as it goes forward and
13 monitoring what needs to be done next.

14 We've amped up concussion education, both of coaches
15 and students, because it's important for students to understand
16 when they may have been concussed so they can go and say, here
17 is what I am experiencing. And that's the injunctive relief
18 which we think is significant. And we think it will have a
19 very protective effect of student athletes going forward.

20 Medical monitoring. And I'm glad -- you're right we
21 used that word overbroad. And I will not do so in the future.

22 The medical monitoring program will work this way:
23 First there is a medical science committee that's been
24 established, two nominated by us; two nominated by the NCAA.
25 They cover a wide variety of medical fields. Judge Andersen

1 will be the chair, if you approve the settlement, of the
2 medical science committee, to make sure that it's working
3 properly and that if there is any impasses he can use his
4 well-known mediation skills to get through those.

5 They will develop a questionnaire. And the
6 questionnaire will be designed to test. There is all kinds of
7 tests that you can get on paper to figure out if people may be
8 having injuries caused by concussions. That questionnaire will
9 be put on a website. Any class member can fill it out. It
10 will be screened and judged by criteria to be developed by the
11 medical science committee. And if they qualify, they then will
12 be available for two types of testing, either a post-concussion
13 syndrome testing or a testing for CTE, a more severe form of
14 brain injury.

15 So if they qualify, they go to a test center. They
16 get -- the test results will come out, will tell them whether
17 they have a concussion-related injury and what treatment
18 options are available going forward. Because if you find out
19 the cause of your injury, you can do something about it. And
20 so hopefully that will happen.

21 It will cover any athlete who's ever played can make
22 an application for medical monitoring. And it will go forward
23 for 50 years, so that the kids playing now or the kids who
24 are -- you know, just got done playing will be covered by this,
25 because the later-life diseases tend to happen around age 35 to

1 50. And then they tail off after that.

2 The final aspect of the settlement is a \$5 million
3 research fund. And the research is going to be focused on how
4 to prevent concussions. When we've talked about it, I think in
5 a few years, maybe three or four years, through research that
6 we're funding here and is being studied elsewhere, that
7 plaintiffs will actually have devices on their heads in all
8 sports. And we will measure the g-forces. And when they reach
9 a certain level, a light will go off in the box and they have
10 to come out.

11 So that's the kind of thing we hope this research fund
12 will develop to prevent future concussions. And that is kind
13 of the summary of the settlement. And I'm able to take any
14 questions that you have, your Honor, at this point.

15 HONORABLE JUDGE BROWN: I presume you have some kind
16 of succession plan for medical monitoring committee?

17 MR. BERMAN: Yes, it's a -- it's a five-year
18 appointment. There are staggered appointments for the members.
19 Judge Anderson is willing to do the first five years, and then
20 we have to reexamine it after that. There will have to be a
21 succession appointment for me too because I won't be around
22 when this program ends. So we have a deal with someone else.

23 THE COURT: With regard to the settlement contemplates
24 I believe it's \$70 million --

25 MR. BERMAN: That's correct.

1 THE COURT: -- set aside for that. And again, this
2 may be in your supporting materials. I believe there is a
3 declaration by a physician in here. But how was that amount
4 arrived at?

5 MR. BERMAN: It was through our analysis of how much
6 may be necessary, how many tests might be out there, how much
7 those tests costs. So you'll see in the report of Mr. Bruce
8 Deal, it's Exhibit 8, I think, to the papers we gave you -- is
9 that the right number? Exhibit 8.

10 What we did, your Honor, was something we think very
11 thorough. We hired Dr. Cantu, Mr. Deal who is an economist
12 with a well-known statistician background. We hired an expert,
13 a Ph.D. in healthcare matters. We hired an epidemiologist and
14 a health economist. And we hired an actuary. So we had five
15 different disciplines look at how many people will even be
16 alive who are within the class of 30 years. What is the
17 incident of concussion rates in various sports. How many class
18 members there are.

19 So basically we know there is roughly 4.2 million
20 class members. 700,000 of them played football. 1.1 million
21 were in other contact sports. And 2 million were in
22 non-contact sports.

23 We then can take the concussion rates in the football
24 and other sports and multiply them out over time. And then we
25 know the medical literature on how many unresolved PCS cases

1 there are over time, and how many CT cases there might be. And
2 we're able to have a range of a high-low of how many tests are
3 going to be done and what they cost.

4 We've actually gone out and got very thorough cost
5 estimates from a firm that's doing similar testing in the BP,
6 British Petroleum, settlement and in the NFL settlement. So we
7 think we came up with this estimate, got some real hard number.
8 Lot of homework went into this, was kind of -- kind of fun
9 actually.

10 THE COURT: Okay. And so assuming that the settlement
11 is eventually approved, this is what the class is receiving.
12 As part of the settlement, what is the class giving up?

13 MR. BERMAN: The class is only giving up one thing,
14 and that's the right to sue for medical monitoring relief.
15 That's it.

16 THE COURT: What about there is some mention in the
17 papers about the class waiving their right to proceed under
18 23(b)(3) to pursue their individual class claims on a classwide
19 basis? Is that part of the settlement as well?

20 MR. BERMAN: I'm sorry, can you say that --

21 THE COURT: Is that part of the settlement as well;
22 that is, is the class agreeing to waive it's rights to proceed
23 under 23(b)(3) or at least try to proceed under 23(b)(3) with
24 regard to their personal injury claims?

25 MR. BERMAN: That's correct. And the reason for that

1 was, we've already gone on to that a little bit. But the other
2 reason was, we couldn't get funding because the insurance
3 companies in the NCAA are not going to put up \$70 million and
4 then turn around the next day and have a new class action on
5 personal injuries. So that was a tradeoff that we thought was
6 in the best interest of the class.

7 THE COURT: But each individual class member has the
8 right and retains the right to pursue their full extent of
9 their individual injury claims, is that correct?

10 MR. BERMAN: That's correct. In fact, I am pursuing
11 them for some clients. I have new clients who are going to
12 stay in the settlement. But they are also going to bring their
13 personal injury claims. And I think there will be more
14 personal injury claims when the news of this gets out, frankly.

15 HONORABLE JUDGE BROWN: So they will be giving up that
16 right under not just Federal Rules of Civil Procedure but any
17 state comparable --

18 MR. BERMAN: That's right.

19 HONORABLE JUDGE BROWN: -- action proceeding?

20 MR. BERMAN: That's right. Just the right to bring
21 personal injury class action, not the right to bring a case.

22 HONORABLE JUDGE BROWN: But under any state class
23 action mechanism as well.

24 MR. BERMAN: That's correct, your Honor. But again, I
25 know of no case, and we get into the briefing, that allows

1 under Amchem or other Supreme Court precedent a personal injury
2 class action.

3 THE COURT: Well, I mean --

4 MR. BERMAN: That's just not done.

5 THE COURT: I understand that's your position. I am
6 sure that there is people out there, Mr. Edelson being one,
7 that may disagree with that position. And that kind of cuts
8 both ways, right? Because if the parties are so sure that a
9 23(b) class will not be certified, why is it part of the
10 settlement at all, right?

11 Mr. Mester I see is waiting to get up. Please.

12 MR. MESTER: Your Honor, quite simply, it's the cost
13 of the defense, disruption of litigation. We know if we don't
14 resolve the class claims, that there will be an incentive for
15 other class action lawyers to file other class actions.

16 And so a substantial benefit to this settlement is
17 that we eliminate that risk once and for all. But Mr. Berman
18 is exactly right. Individual class members retain the right to
19 pursue individual claims. As I mentioned earlier, not only
20 that, but we made clear in the settlement that the tolling --
21 the statute of limitations are all tolled. So there will be no
22 prejudice whatsoever based upon the pendency of this class
23 case.

24 But in terms of limiting class exposure, it's really a
25 cost of defense because it's enormously expensive to litigate

1 these cases.

2 MR. BERMAN: There is -- in terms of what class
3 members are receiving who may want to bring personal injury
4 claims, they are receiving the play book. What I mean by that
5 is, one of the things we wanted to do if we kept going was, we
6 were going to ask you to issue certify the issues of whether
7 the NCAA breached their duty and whether they had a duty. Two
8 big legal issues.

9 In our class certification paper and our proffer,
10 we've given any person who wants to bring a personal injury
11 claim against NCAA the play book. They don't need to do any
12 further work. All the documents are identified. All the hot
13 stuff that we gathered over three years is right there. And,
14 in fact, I know that there are lawyers in the country who have
15 taken that work product, put it in their complaints, and are
16 proceeding with individual personal injury claims. That was
17 one of our objectives in representing the class. Everyone's
18 interest was to make that play book available to facilitate
19 future personal injury claims.

20 THE COURT: Okay. At this point in time I will allow
21 any of the other plaintiffs' counsel to make statements or
22 present any arguments or reactions to the class.

23 MR. LEWIS: Thank you, your Honor. Richard Lewis.

24 I just wanted to reference an earlier appearance that
25 I made before this Court on behalf of the Walker plaintiffs,

1 regarding our concerns with the medical monitoring
2 negotiations. Our two basic concerns at the time were to make
3 sure that the older football players were fully covered in the
4 medical monitoring program. And the particular types of
5 cognitive and behavioral problems they're experiencing in mid
6 to late life were covered by the monitoring program. And our
7 second concern was that it reach all 50 states.

8 You asked that I on behalf of the Walker plaintiffs
9 confer with Hagens Berman in trying to find a way to work
10 together, and we have done that. And I've been able to work
11 with them and with the NCAA in the mediation, and with the
12 assistance of our experts who were focused on the long-term
13 hazards to the mid to late life hazards of subconcussive
14 impacts.

15 So I appreciate the Court encouraging us to do that.
16 And we were able to do that and in the settlement provisions
17 reflect that cooperative work. Thank you, your Honor.

18 THE COURT: Anyone else? Mr. Edelson?

19 MR. EDELSON: Thank you, your Honor.

20 Your Honor, along with I am sure members of the press,
21 perhaps the Court, we're still digesting the settlement. We
22 didn't get the normal three-day notice period. We've gotten a
23 bunch of briefs and papers this morning. I've been looking at
24 it.

25 I'd like to make a couple brief comments. But we

1 really would think that the Court might benefit from a written
2 brief by us where we can lay out our objections. And I think
3 if we have a chance to study some of the issues, we're seeing a
4 little bit more closely, either they'll be cleared up or we can
5 make the points perhaps a bit more eloquently. So we ask that
6 we can submit a brief.

7 That being said, as we understand the settlement, it
8 is going to benefit no one here in any real way other than the
9 NCAA and the plaintiffs' attorneys. We've got a procedure.
10 First the idea that it's a \$70 million settlement is not true.
11 It's not. This is a \$70 million price tag around what is --
12 you couldn't even call it a claims-made settlement.

13 Under the deal the NCAA puts \$25 million in a pot.
14 That amount is going to be paid to the attorneys, 15 million.
15 I think if I understood it correctly, 5 million for notice, and
16 then \$5 million more for basically the reimbursement of
17 co-pays, as I understand it, for the testing. We'll get there
18 in a minute.

19 Then if by any chance the \$5 million is eaten up, that
20 money might go back in at some later point. But the idea that
21 there really is \$70 million going out, we have no basis for
22 that at all. This is exactly what the Seventh Circuit just
23 looked at in a recent case, saying, you know, we got to be
24 really careful when we got claims-made deals in saying what the
25 ceiling is and pretending that that's what's actually going to

1 be paid out.

2 Now let's look at what -- what actual members of the
3 class are going to -- if they are going to care about the
4 settlement. We've got 4 million people. Most of the people
5 weren't involved in -- in high impact sports at all. You got
6 the archers, you got the bowlers, you got the runners.
7 Somehow they are mixed up in the settlement. They're going to
8 get nothing from it at all.

9 Then you got people who actually were involved in high
10 impact sports. And people we care the most about ought to be
11 the people who were injured. Those people have already got a
12 test. All the clients that Mr. Berman was talking about have
13 undergone tests and have medical treatment. And that's what
14 they are suing about.

15 So the fact -- I don't know how he goes to his clients
16 and says, this is a good deal. What you've won in this deal is
17 a chance to get another test. No benefit at all.

18 The injunctive relief, we've heard that the NCAA had
19 to correct Mr. Berman last time when they took credit for a lot
20 of what the NCAA apparently was doing on its own. But whether
21 that's a good social good or not, and I believe it is, that
22 doesn't actually benefit people who are no longer NCAA student
23 athletes, which is most of the class. So we might think that's
24 a good thing, but there's no direct benefit.

25 So how about -- how about the people who were injured,

1 who suffer real damages? They get -- they get this kind of
2 fake relief of you can -- you can fill out a questionnaire, and
3 then there is a secret algorithm. And if the panel decides
4 that you fit, you can get a test that you don't want.

5 And what do they lose? They lose the right to
6 participate in a class action. Mr. Berman should talk to Mr.
7 Siprut about what the chances are of getting a personal injury
8 class certified. At the beginning of this case, what they said
9 to the press was, of course you can get a class action
10 certified. Even when they moved for certification on a more
11 limited basis, Mr. Siprut said to the press, don't worry, we're
12 going to move for the damage class later on.

13 Now when the NCAA cleverly makes them trade, he says,
14 which clients do you care more about? The few people who maybe
15 haven't been tested yet or the people who are really injured?
16 You've got -- you've got a choice to make.

17 They say, well, it's in the best interest of the class
18 to now pretend you can ever get a personal injury class
19 certified. It's not true. We cited cases post Amchem. You
20 look at the NFL deal. That NFL deal, the NFL wasn't simply
21 worried about the litigation costs when they put up three
22 quarters of a billion dollars. Personal injury class action
23 has a significant amount of value.

24 Now, what's going to -- what's the harm? As Mr.
25 Berman says, these people can bring their own individual cases.

1 And he actually went for, I think, he, hidden understanding, is
2 arguing against his own interest to explain how hard it is.
3 You've got to get experts. You've got to find attorneys, all
4 that.

5 And the big problem, your Honor, is that most of the
6 class, the personal injury claims are worth five figures,
7 not -- not six figures, not seven figures. And so taking the
8 client who has a claim where they might be able to get \$20,000,
9 \$10,000, \$8,000, and saying, go find a personal injury attorney
10 who's going to bring this, they can't.

11 What the -- what the NCAA will get out of this deal is
12 the elimination of billions of dollars of liability. There
13 will not be personal injury claims brought by 95 percent of the
14 class. They will never pay them. They will be gone like that.
15 And they are doing it for \$15 million in fees and some secret
16 algorithm.

17 That's our argument.

18 THE COURT: So let me just cut to the chase then,
19 Mr. Edelson. Would you have objections to the settlement if
20 the plaintiffs were not waiving their 23(b)(3) rights to
21 proceed on a classwide basis as to personal injury claims?

22 MR. EDELSON: I would have an objection as a human but
23 not as an attorney. I wouldn't care. I mean, I think it's
24 still a bad settlement and silly. But -- but it really isn't
25 my concern.

1 THE COURT: Well, I mean, it would be your concern to
2 the extent that you are representing the Nichols class. And as
3 part of the Nichols class, some of the things they are seeking
4 include medical monitoring, right? Would you file an objection
5 on behalf of your clients, the Nichols and the putative class
6 members in that class, with regard to the current form of the
7 settlement if they were not waiving or releasing their right to
8 proceed under 23(b)(3)?

9 MR. EDELSON: My view would be that they -- they gain
10 nothing from settlement but they lose nothing from the
11 settlement. So it's still a bad settlement. But we would not
12 be objecting, which we told the Court from the beginning.

13 THE COURT: Thank you.

14 Mr. Berman, Mr. Mester, I'll provide you with an
15 opportunity to respond, if you like. One or both.

16 MR. BERMAN: Just briefly, on this last point that
17 there is small claims out there that aren't going to be brought
18 because of the elimination of the ability to bring a class
19 action. He says they're -- they're small claims, five figures.
20 All of a sudden he says, billions of dollars are lost. That
21 doesn't add up. You can't have billions of dollars if there is
22 these tiny claims that are out there.

23 But what he doesn't answer is, let's say that you have
24 a claim again of someone who's got five or \$10,000. How would
25 you prove on a classwide basis that the NCAA breached a duty to

1 each of those people and caused the injury? Because in any of
2 these concussion cases, you've got to examine on an individual
3 basis the sequence of events for each kid.

4 Did a doctor see that kid? Was he then returned to
5 practice without the doctor's approval? Did a doctor not see
6 the kid? Did the kid report the concussion? Did he in fact
7 have a concussion? How do you prove any of those things on a
8 classwide basis? It can't be done.

9 So the notion that we're giving up a right that's
10 valuable is just a fiction. It doesn't stand up if you really
11 analyze how you prove a case. I don't think he has a case on
12 file. I don't think he's litigating an individual concussion
13 case. I am. I know that you can't just do it a recipe for
14 everyone.

15 If you could, let me ask you this: Why wouldn't I
16 have gone for it? I like big-ticket cases. I've done a lot of
17 big-ticket cases. If I could have expanded this into a billion
18 dollar NFL case, I would have.

19 And the NFL analogy is really not apt for two reasons.
20 In the NFL case, you have 4500 personal injury cases pending
21 before Judge Brody in the MDL. So obviously there was a mass
22 of people that you can work with. And maybe it made sense for
23 the NCAA in that kind of case to forget about all the issues
24 that I just raised for you that a plaintiff would have to
25 prove, just to buy peace for public relations purposes.

1 In this case -- there are very few cases out there.
2 There were how many out there? Maybe a dozen in the whole
3 country? Maybe two dozen individual cases. There is not a
4 groundswell to suggest that there is even a need for a class
5 action like there is in the NFL case.

6 So those two, the NFL analogy really doesn't help us
7 here. He says the injunctive relief is of no value. Well,
8 some of our class representatives are current players. Why
9 would it not be valuable for them to have the NCAA implement
10 the best practices that we think this settlement is
11 implementing?

12 We just put up the chart of all the changes. Mr.
13 Mester didn't get up and say I'm wrong. These changes aren't
14 being made. They are being made.

15 And finally, the law recognizes the value of medical
16 monitoring. Mr. Edelson seems to think that doesn't mean
17 anything. But in the NFL case there is medical monitoring. In
18 the BP case there is medical monitoring. The law recognizes a
19 value in people going and finding out from a qualified
20 physician, from a test that's on point, that most people don't
21 even know exist until they get this notice.

22 The law has found value in that. And that's what this
23 settlement accomplishes, your Honor.

24 THE COURT: Thank you.

25 MR. MESTER: Just briefly, your Honor. In terms of

1 Mr. Berman's PowerPoint and some of the things Mr. Edelson
2 said, and as probably expected, we do disagree with some of the
3 characterizations of the discovery. We disagree with some of
4 the characterization what the NCAA -- NCAA did or did not do.
5 But the point of the settlement is to get past those
6 disagreements and to get this litigation resolved.

7 We certainly don't oppose preliminary approval, and we
8 firmly believe that this settlement agreement and the relief
9 that's provided to the class is a very positive step forward
10 for the class and for -- as a whole and for the NCAA.

11 THE COURT: Okay. You may be seated.

12 Mr. Berman, Mr. Mester, one of the issues that I
13 raised at a prior hearing was whether or not a class that is
14 certified under 23(b)(2) can waive a right in a bundle of
15 rights that a class may have under 23(b)(3). Put it that way,
16 it does present a bit of a metaphysical question. But in fact
17 it's a real one here in that in order for a settlement to be
18 approved at the final stage, the Court needs to find a class
19 certification is appropriate under one of the provisions under
20 Rule 23.

21 Here the parties are asking the Court to certify a
22 settlement class under 23(b)(2). As part of that settlement
23 the parties are asking the Court to define the settlement so
24 that the class would, unless they opt out, waive the rights to
25 proceed to seek their damages for personal injury under

1 23(b)(3) on a classwide basis.

2 To be frank, one of the first things I did when I got
3 this memo was to go through to see if I can find some cases
4 that would help me in that analysis. And I recognize that you
5 got a lot to put into this memorandum. And under the local
6 rules you had 15 pages to do it. You asked for 25 pages. That
7 motion is granted. But still I recognize that 25 pages is not
8 all that much space to address all the issues that you wanted
9 to address.

10 But I am particularly interested in this issue because
11 I do think that it's something that I am going to have to
12 address in my deliberations as I consider whether or not I am
13 going to approve this settlement.

14 Yes, you wanted to say something?

15 MR. MESTER: Your Honor, I think there are a couple
16 decisions. One that comes to mind, which modestly post-dates
17 the 1991 amendments of Title VII, was a Seventh Circuit
18 decision Lemon. And I -- I attempted to refer to it earlier at
19 the earlier hearing when I think I referred to this issue as
20 being somewhat thorny.

21 But as I understand it, your Honor, there is good
22 press, Lemon being one, and I think there are other subsequent
23 decisions, that allow for a hybrid settlement that has elements
24 of (b)(2) and elements of (b)(3). I think it was certainly
25 always our intention -- I don't want to speak for Mr. Berman,

1 but I believe it was his as well -- that this would be in that
2 sense a hybrid settlement. It would have elements of (b)(2)
3 but also elements of (b)(3), including but not limited to
4 enhanced notice rights, which would otherwise not be provided
5 under (b)(2). And equally, if not more important, opt-out
6 rights, which would not be provided under (b)(2) but available
7 under (b)(3).

8 So I think my belief and my understanding is that this
9 settlement combines elements of both.

10 THE COURT: Okay.

11 MR. BERMAN: That's correct, your Honor. We are
12 moving under (b)(2) and (d)(1), which we believe allows you
13 discretion to make this a hybrid settlement, and to send notice
14 and opt-out rights. And because of the waiver issues and the
15 opt-out issues, it's exactly why we want you to do that.

16 THE COURT: No, I understand. And again, I didn't
17 have much time to digest all of the memorandum. And so I
18 didn't have a chance to go back and look at all the cases that
19 were cited. But I did look at a couple of those cases. And it
20 seems that in some of those cases, you had a 23(b)(2) class.
21 And for a variety of reasons the Court decided that additional
22 protections would be appropriate.

23 But in those cases, at least in my cursory review of
24 them, I did not see the class giving up any additional rights
25 other than what they would give up under 23(b)(2); that is,

1 they weren't giving up anything that would implicate 23(b)(3).
2 And so that's really the issue that I want the parties to
3 address. And I feel that I am going to give you a chance to do
4 that.

5 So I'd like the parties -- I would like the parties
6 who are proposing the preliminary approval of this settlement
7 to file a supplemental memorandum addressing the issue; that
8 is, addressing basically whether under 23(b)(2) class with or
9 without -- with or without additional protections, whether such
10 a class can waive the right to proceed under 23(b)(3).

11 I will give you up to the 15 pages to do so, if you
12 need them all. How much time would you like to submit that
13 memorandum?

14 MR. BERMAN: Would seven days be okay?

15 THE COURT: That would be more than adequate. So why
16 don't I give you until August 8, that is next Friday, to file
17 the memorandum. Again, it will be limited to 15 pages,
18 addressing that issue.

19 Now, Mr. Edelson you had requested some time to file a
20 formal written response and/or objections to the settlement
21 that's proposed in the motion. How much time would you like to
22 file that?

23 MR. EDELSON: Can we have 28 days?

24 THE COURT: That will be fine, because I also want you
25 to respond to, if you wish to do so and think appropriate, to

1 their memorandum they are going to file on the 8th with regard
2 to the 23(b)(3), 23(b)(3) issue.

3 MR. EDELSON: Of course, your Honor.

4 THE COURT: So I will give you until August 22 to file
5 your response. In light of the fact that you will be
6 addressing that issue as well as the other aspects of the
7 settlement, I will give you up to 30 pages. You need not use
8 them all. But I anticipate you might need more than 15. So I
9 will give you up to 30.

10 MR. EDELSON: I appreciate that, your Honor.

11 THE COURT: So what I would like to do at this point
12 is, I am not going to rule on the motion today. As Mr. Berman
13 alluded, I just received it. I found the hearing today to be
14 quite illuminating. I look forward to the supplemental
15 memorandum that will be submitted in support.

16 I am also reluctant, I must say, to preliminarily
17 approve a class settlement without knowing what the notice
18 efforts are going to be like. And I understand that the
19 parties need about 45 days to put together a notice plan.

20 As the parties know, ascertainability, the Seventh
21 Circuit has found, is a requirement. Whether one thinks it's
22 in the statute or implied, either way it's a requirement. And
23 so whether or not you can readily ascertain the identity of all
24 the putative class members in some objective manner is
25 something that I want to consider prior to providing

1 preliminary approval of the settlement, to make sure that the
2 requirements under 23(b)(2) and/or (3) or (d)(1), depending are
3 all satisfied. Okay?

4 So with regard to that, Mr. Berman, you said that the
5 parties need about 45 days to get that together. Do you
6 anticipate being able to file a memorandum that addresses the
7 issue of ascertainability and reasonable notice in about 45
8 days?

9 MR. BERMAN: Yes, I think, your Honor.

10 MR. MESTER: Yes.

11 THE COURT: Okay. Why don't you go ahead and file
12 that by September 5. So that would be with regard to
13 ascertainability with regard to the protocol that the parties
14 intend to use to provide reasonable notice under 23(d).

15 Since I have everyone here, what I'd like to do is,
16 I'd like to set another -- continue the motion to another
17 hearing date. Once we have had a chance to look at all of the
18 exhibits to the motion, if I find that I require additional
19 either testimony or elaboration with regard to some of these
20 issues, I will issue a minute order asking the parties to
21 address them. Okay?

22 So let's set this case for further status and the
23 continuation with regard to the motion. Let's set that for
24 September 12. Does that --

25 MR. BERMAN: We have my firm retreat that day, your

1 Honor. I am sure everyone will be thrilled if I was not at the
2 conference.

3 THE COURT: I am sure you will be missed.

4 So let's set this then for how about the 19th, the
5 following Friday? Does that work for everyone?

6 MR. MESTER: That's fine.

7 THE COURT: Okay. Let's set it for 10:00 o'clock that
8 morning. And the motion for preliminary approval of class
9 settlement and certification of settlement class will be
10 entered and continued to that date.

11 Is there anything else we need to address today?

12 MR. BERMAN: Not from the plaintiffs.

13 MR. MESTER: No, your Honor.

14 THE COURT: Very well. We are adjourned.

15 (Which were all the proceedings had at the hearing of the
16 within cause on the day and date hereof.)

17 CERTIFICATE

18 I HEREBY CERTIFY that the foregoing is a true, correct
19 and complete transcript of the proceedings had at the hearing
20 of the aforementioned cause on the day and date hereof.

21

22 /s/Alexandra Roth

7/30/2014

23 _____
24 Official Court Reporter
25 U.S. District Court
Northern District of Illinois
Eastern Division

Date